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Lim Kian Aik v Public Prosecutor

B HIGH COURT (SHAH ALAM) — CRIMINAL APPLICATION NO 45BA-44–387–12 OF 2020
NURULHUDA NURAINI JC
14 DECEMBER 2020

C *Criminal Procedure — Bail — Granting or refusing bail — Accused charged with sabotage under s 124K of Penal Code and together with charges discharging pollutants under Environmental Quality Act 1974 and discharging noxious substance into public sewage treatment works under Water Services Industry Act 2006 — Whether charges were one under security offence under Security Offences (Special Measures) Act 2012 — Whether applicant came under exception of sick person that entitled him to be released on bail*

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This was an application for bail by the accused ('applicant') who was charged with a serious offence of sabotage under s 124K of the Penal Code read with s 34 of the same Code together with three charges under the Environmental Quality Act 1974 and two charges under the Water Services Industry Act 2006. The charges against the applicant were discharging pollutants under the Environmental Quality Act 1974 and discharging noxious substance into public sewage treatment works under the Water Services Industry Act 2006. The notice of motion prayed for the following: (a) order that the offence under s 124K of the Penal Code was not a security offence under Security Offences (Special Measures) Act 2012 ('the SOSMA'); (b) s 388 of the Criminal Procedure Code was applicable and that the applicant be released on bail; and (c) the said charges be tried by the sessions court. The applicant submitted that he ought to be released under s 388 of the Penal Code relying on the fact that the applicant was undergoing treatment for coronary syndrome and that even if an offence was committed, it was not one of a security offence under the SOSMA but mischief, the applicant had no control, care or possession of the said premise in the charges and thus was not guilty of the charges tendered against him. The issues for consideration were: (i) whether the charges were one under the security offence under the SOSMA; and (ii) whether the applicant came under the exception of a sick person that entitled him to be released on bail.

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Held, dismissing the application:

(1) Security of a nation and not just Malaysia, all were dependent on intelligence gathering. The terrorist actions 'taken or threatened by substantial body of persons' which was set as the operative part contained

in art 149 of the Federal Constitution ('the FC'), may take other forms, and the effect could be immediate or delayed. Disrupting or even poisoning the water supply would be one example and all these actions were taken or threatened by substantial body of persons. With the security intelligence at the forefront in addition to the fact that terrorist group comprised more than one person, it was only right that s 13 of the SOSMA prohibited bail to be given to the already charged accused person. This was to prohibit any further communication between the already charged accused and another suspect yet to be identified or recognised with their purpose either to strategise any existing plan or make new plans, including recruiting new members. For this reason, the SOSMA was legislated with the discretion to allow bail by the court subject to the exceptions, but with an enhanced electronic monitoring device precaution in place (see paras 71, 74 & 79).

(2) Prior to the court granting bail, it was important to highlight that the SOSMA did not define who a sick person was. The reason why it was not defined was because the legislature deemed it fit and necessary to leave it to the discretion of the courts to determine the degree of sickness of the accused that entitled him or her to be released on bail (see paras 87 & 90).

(3) There was omission by the applicant to depose in his affidavit his health condition, contrary to the prayers in the notice of motion. There was no real urgency as the counsel did not see it as an utmost concern to act immediately upon his client's complaint but had left it to his client's discretion to inform the prison authority. The fact that the applicant was only brought to the Shah Alam Hospital on 25 December 2020 further supported this fact that there was no real emergency. No further statement that the applicant needed a close medical observation and needed to be referred to IJN. This therefore suggested that the acute coronary syndrome was a general descriptive term, with symptoms possibly detected but yet to reach a chronic level. As the general rule was that SOSMA's offence was unbailable unless the case fell within the exception, then the burden was on the applicant to satisfy that it was so. The applicant himself had not deposed anything in his affidavit despite the notice of motion stating that this was the case where the exception applied (see paras 91, 93 & 95–96).

(4) The sabotage offence under s 124K of the Penal Code and the offences relating to terrorism (relevant on the limb discharging of substance) appeared to address the same result or outcome that was prejudicial to public order. On the face of the charges itself, these were serious offences that may bring about the outcome under the limbs in art 149, preamble of the SOSMA and the Penal Code (see paras 101–102).

(5) In this present scenario, security of the Federation or any part thereof against health risk such as currently experienced by the whole world,

against Covid19 pandemic was real. This was part of the harmonious construction rule. In the upshot, the applicant had failed to satisfy the court that: (a) the charges were not one under the security offence under the SOSMA; and (b) the applicant came under the exception of a sick person that entitled him to be released on bail (see paras 105–106).

[Bahasa Malaysia summary

Ini adalah permohonan untuk jaminan oleh tertuduh ('pemohon') yang didakwa melakukan kesalahan sabotaj yang serius di bawah s 124K Kanun Keseksaan yang dibaca dengan s 34 Kanun yang sama berserta tiga pertuduhan di bawah Akta Kualiti Alam Sekeliling 1974 dan dua pertuduhan di bawah Akta Industri Perkhidmatan Air 2006. Pertuduhan terhadap pemohon adalah membuang bahan pencemar di bawah Akta Kualiti Alam Sekeliling 1974 dan membuang bahan berbahaya ke dalam kerja-kerja rawatan kumbahan awam di bawah Akta Industri Perkhidmatan Air 2006. Notis usul memohon perkara berikut: (a) perintah agar kesalahan di bawah s 124K Kanun Keseksaan bukanlah kesalahan keselamatan di bawah Akta Kesalahan Keselamatan (Langkah-Langkah Khas) 2012 ('AKK'); (b) s 388 Kanun Tatacara Jenayah telah terpakai dan bahawa pemohon dibebaskan dengan jaminan; dan (c) pertuduhan tersebut dibicarakan oleh mahkamah sesyen. Pemohon menyatakan bahawa dia seharusnya dibebaskan di bawah s 388 Kanun Keseksaan dengan bergantung pada fakta bahawa pemohon menjalani rawatan untuk sindrom koronari dan bahawa walaupun kesalahan itu dilakukan, ia bukan kesalahan keselamatan di bawah AKK tetapi salah laku, pemohon tidak mempunyai kawalan, penjagaan atau pemilikan premis tersebut dalam pertuduhan dan dengan itu tidak bersalah atas tuduhan yang diajukan terhadapnya. Isu-isu untuk pertimbangan adalah: (i) sama ada pertuduhan tersebut adalah satu kesalahan keselamatan di bawah AKK; dan (ii) sama ada pemohon berada di bawah pengecualian orang sakit yang berhak dibebaskan dengan jaminan.

Diputuskan, menolak permohonan:

(1) Keselamatan sebuah negara dan bukan hanya Malaysia, semuanya bergantung pada pengumpulan risikan. Tindakan pengganas yang 'diambil atau diancam oleh sejumlah besar orang' yang ditetapkan sebagai bahagian operatif yang terkandung dalam perkara 149 Perlembagaan Persekutuan ('PP'), boleh mengambil bentuk lain, dan kesannya boleh secara langsung atau ditunda. Mengganggu atau meracuni bekalan air akan menjadi salah satu contoh dan semua tindakan ini diambil atau diancam oleh sejumlah besar orang. Dengan perisikan keselamatan di barisan hadapan selain fakta bahawa kumpulan pengganas terdiri daripada lebih dari satu orang, adalah wajar bahawa s 13 AKK melarang jaminan diberikan kepada orang yang telah dituduh. Ini untuk melarang komunikasi lebih lanjut antara orang yang telah

dituduh dan suspek lain yang belum dikenal pasti atau dikenali dengan tujuan mereka sama ada untuk menyusun rancangan yang ada atau membuat rancangan baru, termasuk merekrut anggota baru. Atas sebab ini, AKK digubal dengan budi bicara untuk membenarkan jaminan oleh mahkamah yang tertakluk kepada pengecualian, tetapi dengan pencegahan alat pemantauan elektronik yang dipertingkatkan (lihat perenggan 71, 74 & 79).

(2) Sebelum mahkamah memberikan jaminan, adalah penting untuk menekankan bahawa AKK tidak mentakrifkan siapa orang yang sakit. Sebab mengapa ia tidak ditakrifkan adalah kerana badan perundangan menganggapnya sesuai dan perlu untuk menyerahkannya kepada mahkamah untuk menentukan tahap penyakit tertuduh yang berhak dibebaskan dengan jaminan (lihat perenggan 87 & 90).

(3) Terdapat peninggalan oleh pemohon untuk menyatakan dalam afidavit keadaan kesihatannya, bertentangan dengan permohonan dalam notis usul. Tidak ada kecemasan yang nyata kerana peguam tidak melihatnya sebagai perhatian utama untuk segera bertindak atas aduan kliennya tetapi telah membiarkannya untuk mengikut budi bicara kliennya untuk memberitahu pihak berkuasa penjara. Fakta bahawa pemohon hanya dibawa ke Hospital Shah Alam pada 25 Disember 2020 menyokong fakta ini bahawa tidak ada kecemasan nyata. Tidak ada pernyataan lebih lanjut bahawa pemohon memerlukan pemerhatian perubatan yang teliti dan perlu dirujuk ke IJN. Oleh itu, ini menunjukkan bahawa sindrom koronari akut adalah istilah deskriptif umum, dengan gejala yang mungkin dikesan tetapi belum mencapai tahap kronik. Oleh kerana peraturan umum adalah kesalahan AKK tidak dapat diberi jaminan melainkan jika kes itu termasuk dalam pengecualian, maka beban pemohon adalah untuk membuktikannnya. Pemohon sendiri tidak mengemukakan apa-apa dalam afidavitnya walaupun ada notis usul yang menyatakan bahawa ini adalah kes di mana pengecualian berlaku (lihat perenggan 91, 93 & 95–96).

(4) Kesalahan sabotaj di bawah s 124K Kanun Keseksaan dan kesalahan yang berkaitan dengan keganasan (berkaitan dengan pelepasan bahan) kelihatan menangani hasil atau kesan yang sama yang memudaratkan ketenteraman awam. Mengenai pertuduhan itu sendiri, ini adalah kesalahan serius yang boleh membawa kesan di bawah cabang perkara 149 PP, mukadimah AKK dan Kanun Keseksaan (lihat perenggan 101–102).

(5) Dalam senario ini, keselamatan Persekutuan atau bahagiannya terhadap risiko kesihatan seperti yang dialami oleh seluruh dunia ketika ini, terhadap pandemik Covid19 adalah nyata. Ini adalah sebahagian daripada peraturan pembinaan harmoni. Oleh itu, pemohon gagal meyakinkan mahkamah bahawa: (a) pertuduhan tersebut bukan satu

kesalahan keselamatan di bawah AKK; dan (b) pemohon berada di bawah pengecualian orang sakit yang berhak dia dibebaskan dengan jaminan (lihat perenggan 105–106).]

Cases referred to

Abdullah bin Atan v PP and other appeals [2020] 6 MLJ 727; [2020] 9 CLJ 151, FC (refd)
Alma Nudo Atenza v PP and another appeal [2019] 4 MLJ 1, FC (refd)
Application of Tan Boon Liat @ Allen, Re; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [1976] 2 MLJ 83 (refd)
Arumugam a/l Kalimuthu v Menteri Keselamatan Dalam Negeri & Ors [2013] 5 MLJ 174, CA (refd)
Baker v R [1975] AC 774, PC (refd)
Dalip Bhagwan Singh v PP [1998] 1 MLJ 1, FC (refd)
Datuk Tan Leng Teck v Sarjana Sdn Bhd & Ors [1997] 4 MLJ 329, HC (refd)
Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals [2018] 1 MLJ 545, FC (refd)
Kerajaan Malaysia & Ors v Nasharuddin Nasir [2003] MLJU 841; [2004] 1 CLJ 81, FC (refd)
Koh Chin Wah v PP (unreported), FC (refd)
Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor [2021] 1 MLJ 750, FC (refd)
Mohd Amin bin Mohd Razali & Ors v PP [2003] 4 MLJ 129, FC (refd)
Mohd Faizal bin Musa v Menteri Keselamatan Dalam Negeri [2018] 3 MLJ 14, CA (refd)
Murad Halimuddin bin Hassan dan satu lagi lwn Pendakwa Raya dan satu lagi rayuan [2018] 6 MLJ 435, CA (refd)
Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee [2004] 3 MLJ 253; [2004] 2 CLJ 787, FC (refd)
PP v Atik Hussin bin Abu Bakar and other cases [2016] MLJU 968, HC (refd)
PP v Chew Siew Luan [1982] 2 MLJ 119, FC (refd)
PP v Hassan bin Hj Ali Basri [2014] 7 MLJ 153, HC (refd)
PP v Kadir Bin Uyung & Anor and another appeal [2017] MLJU 1692, CA (refd)
PP v Khairuddin bin Abu Hassan & Anor [2017] MLJU 188; [2017] 4 CLJ 701, CA (consd)
PP v Mohd Amin bin Mohd Razali & Ors [2002] 5 MLJ 406, HC (refd)
Saminathan a/l Ganesan v PP [2020] 7 MLJ 681, HC (refd)
Selva Vinayagam a/l Sures v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2021] 1 MLJ 601, FC (refd)
Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case [2017] 3 MLJ 561, FC (refd)
Suresh Kumar a/l Velayuthan v PP [2020] 10 MLJ 549; [2020] 4 CLJ 270, HC (refd)
Talasco Insurance Bhd (formerly known as Talasco Insurance Sdn Bhd) v Goh

Thiam Hock [1999] 1 MLJ 179, HC (refd)
Young v Bristol Aeroplane Co, Limited [1944] KB 718, CA (refd)

Legislation referred to

Anti-Trafficking in Persons and Anti-Smuggling of Migrants 2007 s 26A, Part IIIA
Criminal Procedure Code ss 388, 388(1), 388A, 388A(1), (5), (6)
Dangerous Drugs Act 1952 s 37A
Environmental Quality Act 1974 ss 18(1), 19A, 34(2), 34B(1)(a)
Federal Constitution arts 4, 9, 121, 149, 149(1)(c), (1)(e), (1)(f), 160
Immigration Act 1959/63 ss 59, 59A
Internal Security Act 1960 (repealed by Security Offences (Special Measures) Act 2012)
Penal Code ss 34, 121, 124K, 124L, 130A, 130A(d), (h), 130KA, 130M, 130U, 391, 430, Chapters VI, VIA, VIB
Police Act 1967 s 20(3)
Security Offences (Special Measures) Act 2012 ss 4(1), 13, 13(2), First Schedule
Special Measures Against Terrorism in Foreign Countries Act 2015
Water Services Industry Act 2006 s 61(1)(b)

Wan Kok Cheong (KC Wan & Co) for the applicant.
Ho Kwong Chin (Deputy Public Prosecutor, Selangor State Legal Advisor's Office) for the respondent.

Nurulhuda Nuraini JC:

INTRODUCTION

[1] This is an application for bail by the applicant accused who is charged with a serious offence of sabotage under s 124K of the Penal Code read with s 34 of the same Code together with three charges under the Environment Quality Act 1974 and two charges under the Water Services Industry Act 2006. All these charges are read together with s 34 of the Penal Code.

[2] The notice of motion encl 1 prayed for the following:

(a) order that the offence under s 124K of the Penal Code is not a security offence under SOSMA;

(b) s 388 is applicable and that the applicant be released on bail; and

(c) the said charges be tried by the sessions court.

[3] This court, having perused the application and affidavits filed by both parties and upon hearing submissions, dismissed the said application. This judgment is written giving reasons for the dismissal.

APPLICATION AND REASONS

[4] In the notice of motion dated 22 December 2020, states that the application is supported by the affidavit of Lim Kian Aik encl 2 affirmed on 22 December 2020 and the reasons supporting the prayers as stated in the application are summarised as follows:

(a) the charge is not one of terrorism thus SOSMA does not come into play;

(b) the charge comes under art 149(1)(e) but this is not captured by the SOSMA preamble;

(c) facts deposed will show that the applicant is innocent hence will not abscond if bail is granted; and

(d) the applicant suffers from heart problem and justifies to be released on bail.

[5] The affidavit encl 2 of Lim Kian Aik, on the other hand in para 3 sought only the following prayer:

(a) that he be released on bail;

(b) the s 124K offence is not governed by SOSMA thus the Criminal Procedure Code to be applied instead; and

(c) the charges proffered against him to be tried before the sessions court.

[6] Nothing was said about his medical problem. The other contents of the said affidavit consist of deposition on the following:

(a) the offence of SOSMA in its preamble, contrary to art 149 of the Federal Constitution does not include a s 124K offence;

(b) that he has merits in his defence; and

(c) the assurance that if bail is granted, he would not abscond.

[7] There was no averment in his affidavit as to his health status that formed one of the bases in the summarised prayer in the notice of motion or that led to the wife's affidavit filed subsequently.

[8] His wife's affidavit Lee Yin Fong affirmed on 28 December 2020 said that on 22 December 2020 (the date the applicant's affidavit was affirmed) the

applicant complained of chest pain to his counsel who came to seek instruction from him and was advised by his counsel to let the prison authority know for immediate referral to the hospital.

[9] On 25 December 2020, the prison authority referred the applicant to the Shah Alam Hospital that led the counsel to write to the hospital on 26 December 2020, seeking for a medical note on the applicant's status. A note from the medical officer Dr Nur Diyanah Shahirah dated 26 December 2020 states that the applicant is being treated for 'acute coronary syndrome'. This, was further deposed by Lee Yin Fong that 'acute coronary syndrome' is also known as 'heart attack'.

SUBMISSION BY PARTIES

[10] The applicant relied on the case of *Public Prosecutor v Khairuddin bin Abu Hassan & Anor* [2017] MLJU 188; [2017] 4 CLJ 701 a decision by the Court of Appeal involving a charge under s 124L of the Penal Code which was unanimously ruled as follows:

> [2] SOSMA is intended by the Parliament to combat terrorism. The preamble of SOSMA shows that it is enacted to deal with four out of the six categories of action under art 149(1) of the FC ie paras (a), (b), (d) and (f) and not the action under paras (c) and (e). Further, the scheme and the provisions of SOSMA are designed to limit the fundamental liberties under arts 5, 9, 10, and 13 of the FC and to depart from the procedures laid down under the Criminal Procedure Code. Although SOSMA merely regulates the trial of the offences and does not create the said offences, undoubtedly a person charged and tried under SOSMA will lose his liberty as he will be denied bail. Therefore, in interpreting SOSMA the court should be guided by the principle of giving full recognition to the fundamental rights and freedoms.
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> [3] Every Act of Parliament or law enacted under art 149 must stipulate specifically the action that has been taken by the body of persons, which necessitates the promulgation of such a law. There are specific actions enumerated in art 149(1) of the FC and SOSMA has adopted or recited only some of the actions. Whilst there was no ambiguity that SOSMA was enacted under art 149(1)(a), (b), (d) and (f) of the FC, there was ambiguity whether the charge against the respondents under s 124L of the Penal Code was intended by the Parliament to be categorised as security offences under art 149(1) of the FC.
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> [4] Applying the principles of statutory interpretation, the action which the respondents were alleged to attempt to commit fell within the ambit and purview of para (e) of art 149(1) of the FC and by the express exclusion of para (e) of art 149(1) in the recital of SOSMA, Parliament could not have intended to designate such act as a security offence.

[11] Counsel for the applicant further submits that based on *Khairuddin,* the applicant ought to be released under s 388 of the Penal Code relying on the fact

A that the applicant is undergoing treatment for coronary syndrome and that based on the facts deposed, even if an offence is committed, it is not one of a security offence under SOSMA but mischief, the applicant has no control, care or possession of the said premise in the charges and thus is not guilty of the charges tendered against him.

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[12] Reliance was also placed on the latest decision by the Federal Court in *Koh Chin Wah* which allowed bail on the applicant charged with s 26A of the ATIPSOM by resorting to s 388 of the CPC. Section 26A of the ATIPSOM under Part IIIA of the Act is a security offence listed in the First Schedule of the SOSMA. There is however, no ground of judgment just yet in *Koh Chin Wah.* The applicant suggests that this court would be bound by the apex courts' decisions in *Khairuddin* and *Koh Chin Wah* on the maxim of stare decisis.

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D **[13]** The respondent submits that the decision in *Koh Chin Wah* was decided per incuriam and the exceptions in *Young v Bristol Aeroplane Co, Limited* [1944] KB 718 applies. The exceptions being:

(a) that the Court of Appeal is entitled and bound to decide which of the two conflicting decisions of its own it will follow;

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(b) that the Court of Appeal is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords; and

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(c) that the Court of Appeal is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam.

[14] The decisions said to be in conflict is found in *Abdullah bin Atan v Public Prosecutor and other appeals* [2020] 6 MLJ 727; [2020] 9 CLJ 151 going against *Koh Chin Wah.* In *Abdullah bin Atan*, Tengku Maimun Tuan Mat Chief Justice quoting with approval the decision in *Public Prosecutor v Chew Siew Luan* [1982] 2 MLJ 119, an earlier decision of the Federal Court which Raja Azlan Shah CJ (Malaya) said as follows:

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> The Dangerous Drugs Act 1952 (Revised 1980) is an Act specifically designed to regulate the importation, exportation, manufacture, sale and use of, inter alia, dangerous drugs, and 'to make special provisions relating to the jurisdiction of courts in respect of offences thereunder and their trial, and for purposes connected therewith'. In other words, the Act is in substance a special law passed by Parliament in derogation of the rights of a person concerning the granting of bail in an otherwise ordinary case.
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> We further note in particular that s 41B of the Act is an entirely new section introduced by the Dangerous Drugs (Amendment) Act, 1978 (Act A426) and became operative on 10 March 1978. Generalibus specialia derogant is a cardinal principle of interpretation. It means that where a special provision is made in a special statute, that special provision excludes the operation of a general provision in

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the general law. (See also *Public Prosecutor v Chu Beow Hin* [1982] 1 MLJ 135 at p 137). The provisions of s 3 of the Criminal Procedure Code which counsel for the respondent seeks to rely on has no relevance whatsoever to the matter in issue before us.

It would be erroneous to apply expressions used and provisions made in one statute to another and entirely different one in complete disregard of the latter's express stipulations in the light of its specific purpose and object. On the other hand, it is a sound, and, indeed, a well-known principle of construction of a statute that the purport of words and expressions used in a legislative measure must take their colour from the context in which they appear. We do not therefore agree with the learned judge that it is open to a court to subject the express provisions regarding bail in s 41B of the Dangerous Drugs Act to the provisions relating thereto in the Criminal Procedure Code. The provisions regulating the granting of bail under the Dangerous Drugs Act must be construed in the context of that Act and not in that of the Criminal Procedure Code and to that extent the general provisions of the Criminal Procedure Code must ex necessitate yield to the specific provisions of s 41B of the Dangerous Drugs Act in that regard.

REASONS FOR THE DECISION ON THE FIRST ISSUE: WHETHER S 124K IS A SECURITY OFFENCE

[15] Section 124K of the Penal Code concerns with an offence of sabotage. 'Sabotage' is defined in s 130A(h) as:

'sabotage' means —

(a) an act or omission intending to cause harm —

(i) for the interests of foreign powers or foreign organizations;

(ii) to premises or utilities used for national defence or for war; or

(iii) to the maintenance of essential services; or

(b) knowingly producing defective materials, premises or utilities used for national defence or for war.

[16] In sub-para (d), 'essential services' is defined as:

'essential services' includes —

(a) water services;

(b) electricity services;

(c) public health services;

(d) banking and financial services;

(e) fire services;

(f) prison services;

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(g) postal services;

(h) telecommunication services including the communication infrastructure;

(i) telegraph services;

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(j) radio communication services including broadcasting and television services;

(k) port, dock and harbour services and undertakings;

(l) public transport services by land, sea or air; or

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(m) bulk distribution of fuel and lubricants.

[17] Article 149 of the Federal Constitution states as follow:

149 Legislation against subversion, action prejudicial to public order, etc.

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(1) If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation —

(a) to cause, or to cause a substantial number of citizens to fear, organized violence against persons or property; or

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(b) to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or

(c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or

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(d) to procure the alteration, otherwise than by lawful means, of anything by law established; or

(e) which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or

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(f) which is prejudicial to public order in, or the security of, the Federation or any part thereof,

any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9, 10 or 13, or would apart from this Article be outside the legislative power of Parliament; and Article 7 shall not apply ...

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[18] The preamble of SOSMA to a certain extent governs the same actions as encompass in art 149 as follows:

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An Act to provide for special measures relating to security offences for the purpose of maintaining public order and security and for connected matters.

[31 July 2012, P.U. (B) 256/2012]

WHEREAS action has been taken and further action is threatened by a substantial body of persons both inside and outside Malaysia —

(1) to cause, or to cause a substantial number of citizens to fear, organized violence against persons or property;

(2) to excite disaffection against the Yang di-Pertuan Agong;

(3) which is prejudicial to public order in, or the security of, the Federation or any part thereof; or (4) to procure the alteration, otherwise than by lawful means, of anything by law established.

[19] Subparagraph (c) and (e) of art 149 appears to be omitted from the SOSMA preamble. It was argued by the applicant that similar to *Khairuddin*, both charged with s 124L read with s 34 of the Penal Code with attempt to commit sabotage of the banking and financial services but was not captured by the preamble of SOSMA. What the Court of Appeal in *Khairuddin* said may have repeatedly been cited in many other cases but is again highlighted here, it being crucial:

[26] To recapitulate, the charge against the respondents is for attempting to sabotage the banking and financial services of the country. Under s 124L of the Penal Code, it is an offence to sabotage essential services. Banking and financial service is included in the definition of essential services.

[27] In concluding that the charge against the respondent falls within the ambit and purview of recital or para (e) of art 149(1) of the Federal Constitution, the learned judge took into account the definition of 'sabotage' and the definition of 'essential services' under s 130A(h) of the Penal Code. We found no error in the approach taken by the learned trial judge. It is an established canon of statutory interpretation that the provisions of a law or a statute must be looked at as a whole and not in isolation.

[20] The Court of Appeal went further and said as follows:

[28] Further, we agreed with the learned judge that in determining whether the offence under s 124L of the Penal Code is a security offence under SOSMA, the proper approach to be adopted is the purposive approach.

[29] In this regard, s 17A of the Interpretation Acts 1948 and 1967 enjoins a court to interpret a provision of an Act that would promote the purpose or object underlying the Act. It reads:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[21] With the *Hansard* and Minister's speech in tabling SOSMA before the court, in the final analysis, the Court of Appeal ruled as follows:

[33] From the statements by the Minister, it is crystal clear that the purpose and objective of SOSMA is to combat terrorism.

A [34] We next made reference to the internal aid namely the preamble, the scheme and the provisions of SOSMA. The preamble of SOSMA as set out above shows that SOSMA was enacted to deal with four out of the six categories of action under art 149(1). The scheme and the provisions of SOSMA were designed to limit the fundamental liberties under arts 5, 9, 10, and 13 of the Federal Constitution and to
B depart from the procedures laid down under the Criminal Procedure Code, the law which governs the conduct of criminal cases. Although SOSMA merely regulates the trial of the offences and does not create the said offences (see *Public Prosecutor v Yazid Sufaat & Ors* [2015] 1 MLJ 571; [2014] 2 CLJ 670), undoubtedly a person charged and tried under SOSMA will lose his liberty as he will be denied bail. In this
C regard, the learned judge was of the view that in interpreting SOSMA the court should be guided by the principle of giving full recognition to the fundamental rights and freedoms. We found no error in the approach taken by the learned judge.

[35] ...

D [36] To reiterate, the preamble of SOSMA recites the action under paras (a), (b), (d) and (f) of clause (1) of art 149 and not the action under paras (c) and (e) of clause (1) of art 149 of the Federal Constitution. Whilst we found no ambiguity that SOSMA was enacted under art 149(1)(a), (b), (d) and (f) of the Federal Constitution, we found ambiguity whether the charge against the respondents under s 124L of the Penal Code was intended by Parliament to be categorised as
E security offences under art 149(1) of the Federal Constitution.

[37] The ambiguity arises from the fact that the offence created by s 124L of the Penal Code involves an action which falls under para, (e) of cl (1) of art 149 and para (e) has been expressly excluded from the preamble of SOSMA.

F

[22] The deliberation by the Court of Appeal was concluded as follows:

[44] Applying the principles of statutory interpretation as alluded to earlier, we agreed with the learned judge that the action which the respondents were alleged to attempt to commit falls within the ambit and purview of para (e) of art 149(1) of the
G Federal Constitution and by the express exclusion of para (e) of art 149(1) in the recital of SOSMA, Parliament could not have intended to designate such act as a security offence.

[23] With this conclusion by the Court of Appeal, the decision by the High
H Court for the respondents to be released on bail and the charges be tried before the sessions court was upheld.

STARE DECISIS AND EXCEPTION IN YOUNG V BRISTOL AEROPLANE COMPANY, LIMITED

I

[24] One interesting point to note is that in *Khairuddin,* the learned deputy public prosecutor had put forward an argument that even if art 149(e) that governs s 124L is not incorporated in the SOSMA preamble, it could still be covered under the SOSMA third preamble 'which is prejudicial to public order

in, or the security of, the Federation or any part thereof which is under limb (f) of art 149.

[25] It would appear that the Court of Appeal did not agree with this submission and the case of *Re Application of Tan Boon Liat @ Allen; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1976] 2 MLJ 83 referred to by the DPP distinguished as follows:

> [42] We observed that in *Tan Boon Liat,* the court found no ambiguity in s 4(1) of the Ordinance and the reason is apparent from the wordings in the preamble and s 4(1) itself. Section 4(1) clearly specifies the circumstances in which the Minister can arrive at his subjective satisfaction for the purposes of making a detention order with a view to preventing any person from acting in any manner prejudicial to public order or where it is necessary for the suppression of violence or the prevention of crimes involving violence. These are consistent with the preamble which states '... for securing public order, the suppression of violence and the prevention of crimes involving violence'.

[26] However, the case of *Re Tan Boon Liat* was in fact addressing the second part of the DPP's argument. The full submission of the DPP was wider as reported in *Khairuddin*'s case as follows:

> In respect of the second issue, learned DPP contended that by virtue of preamble (3) of SOSMA which reads: 'which is prejudicial to public order in, or the security of, the Federation or any part thereof', s 124L of the Penal Code is covered under art 149 of the Federal Constitution. Relying on the case of *Re Application of Tan Boon Liat & Ors* [1977] 2 MLJ 18; [1977] 1 LNS 107, learned DPP further contended that even in the extreme case where there is no recital or preamble, where the enacting part is explicit and unambiguous, the preamble cannot be resorted to, to control, qualify or restrict the interpretation of SOSMA.

[27] The deliberation by the Court of Appeal focussed on art 149(e) and the absence of it in the preamble of SOSMA paras (1)–(4). It may be argued, that the finding by the Court of Appeal that in *Re Tan Boon Liat* the court 'found no ambiguity in s 4(1) of the Ordinance and the reason is apparent from the wordings in the preamble and s 4(1) itself would have answered the submission by the DPP on the third preamble of SOSMA.

[28] Section 4(1) clearly specifies the circumstances in which the Minister can arrive at his subjective satisfaction for the purposes of making a detention order with a view to preventing any person from acting in any manner prejudicial to public order or where it is necessary for the suppression of violence or the prevention of crimes involving violence. These are consistent with the preamble which states '... for securing public order, the suppression of violence and the prevention of crimes involving violence.' The address by the Court of Appeal on *Tan Boon Liat* would be relevant to address the alternative

A submission by the DPP on the issue of the preamble and the wordings in the relevant section, but not on the first issue of para (f).

[29] This court is of the view that the decision of the Court of Appeal in *Khairuddin* is per incuriam as it did not ventilate on this important point put forward by the DPP. As recognised in *Khairuddin,* apart from action in (e), para (c) of art 149 of the Federal Constitution on 'to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence' was also missing from the SOSMA preamble.

[30] Does this mean that SOSMA was not intended to govern such offences or is para (f) wide enough to govern these two actions in paras (c) and (e) of art 149? The Court of Appeal was of the view that based on the Minister's statement in Parliament, SOSMA is enacted to combat terrorism.

[31] However, terrorist acts may take many forms. One clear example would be the attack on the World Trade Centre in US on September 11. In Malaysia, as a hypothetical example, it may be an attack on Putrajaya. This, no doubt may be dual offence against the state and also terrorism. Terrorism may begin with scattered, cautioned attacks. It may begin with staggered unnoticeable attacks against essential service like in this case, it may be one single act discharging effluent or waste like the present case. However, that would be one direct attack against the state but to rule out it as an act of terrorism may be premature.

[32] The terrorist actions 'taken or threatened by substantial body of persons' which is set as the operative part contained in art 149, may take other forms, and it could be immediate or delayed. It could be by cutting down the communication between internal and external members of the state. Terrorist could plan to attack the communication line RTM (Radio, TV Malaysia), they could plan by disrupting or even poisoning the water supply and all these actions are taken or threatened by substantial body of persons. All these would rightly come under the definition 'essential service' of s 130A of the Penal Code, the aftermath effect under para (f) of art 149 or para (3) of the SOSMA.

[33] One other example pertains to para (c) of art 149 'to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence'. Perhaps it helps by looking at some examples. In the US, at one point of time the 'Ku-Klax Klan' exist, a secret US organisation of white protestant Americans, especially in the south of the country, who oppose people of other races or religions (*https://dictionary.cambridge.org/dictionary/english/ku-klux-klan* on 19 January 2021). Normally, targeting African American.

[34] Closer to home, the 2001 Kampung Medan riot,

(*https://www.malaymail.com/news/malaysia/2015/04/22/in-cross-protest-residents-see-ghost-of-kampung-medan-riots/882845* Wednesday, 22 April 2015 09:31 AM by Yiswaree Palansamy) the 1985 Ibrahim Libya incident, (*https://www.nst.com.my/news/nation/2020/08/616286/nstl75-pain-and-unanswered-questions* by Azdee Amir, 13 August 2020 @ 11:26am) the recent cases of *Saminathan a/l Ganesan v Public Prosecutor* [2020] 7 MLJ 681 and *Suresh Kumar a/l Velayuthan v Public Prosecutor* [2020] 10 MLJ 549; [2020] 4 CLJ 270 concerning support for the Liberation Tigers of Tamil Elaam ('LTTE group') would probably mirror such kind of mass gathering. Why this court says it is 'mass gathering' is because in *Saminathan* and *Suresh*, it concerns not just one person individually charged but more.

[35] All these would be governed by the specific paragraph in art 149 or SOSMA's preamble but yet the impact of all these actions, undeniably are 'prejudicial to public order in, or the security of, the Federation or any part thereof' under limb (f) of art 149, at least that is the conclusion arrived at by this court.

[36] In *Saminathan* and *Suresh*, the charge was terrorism and s 13 of the SOSMA would have barred them from being released on bail, not unless the exception in sub-para 13(2) applies. Further discussion on these cases at a later part of the judgment.

IS *KHAIRUDDIN* OBITER AND *YOUNG BRISTOL* EXCEPTIONS APPLICABLE?

[37] The position taken by this court that *Khairuddin* was decided per incuriam is based on the authority of *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1, a decision by the Federal Court which stipulates as follows:

> To recap, the relevant ratio decidendi in *Young v Bristol Aeroplane* is that there are three exceptions to the general rule that the Court of Appeal is bound by its own decisions or by decision of courts of co-ordinate jurisdiction such as the Court of Exchequer Chamber. The three exceptions are first, a decision of Court of Appeal given per incuriam need not be followed; secondly, when faced with a conflict of past decisions of Court of Appeal, or a court of co-ordinate jurisdiction, it may choose which to follow irrespective of whether either of the conflicting decisions is an earlier case or a later one; thirdly it ought not to follow its own previous decision when it is expressly or by necessary implication, overruled by the House of Lords, or it cannot stand with a decision of the House of Lords. There are of course further possible exceptions in addition to the three exceptions in *Young v Bristol Aeroplane* when there may be cases the circumstances of which cry out for such new exceptions so long as they are not inconsistent with the three exceptions in *Young v Bristol Aeroplane*.

A few words need be said about a decision of Court of Appeal made per incuriam as mentioned above. The words 'per incuriam' are to be interpreted narrowly to mean as per Sir Raymond Evershed MR in *Morelle v Wakeling* [1955] 2 QB 379 at p 406 as a 'decision given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding in the court concerned so that in such cases, some part of the decision or some step in the reasoning on which it is based, is found on that account to be demonstrably wrong'. It should be borne in mind that the year of Morelle's case is 1955 whereas our s 3 of the Civil Law Act was enacted in 1956. The ratio in *Morelle*'s case is also part of the common law applicable to us.

[38] The absence of the Court of Appeal deliberation on this thus pushed this court to a conclusion that the decision in *Khairuddin,* albeit this court is in full agreement with the rationale of the decision but yet it omitted to address the pertinent point put forward by the DPP on para (f), thus is decided per incuriam and hence, it is open to this court to determine the issue as it arises in this case.

[39] In *Talasco Insurance Bhd (formerly known as Talasco Insurance Sdn Bhd) v Goh Thiam Hock* [1999] 1 MLJ 179 also on LTTE group. Suriyadi J quoted a rather pertinent point considered by Mohd Azmi SCJ, which reads:

> We are inclined to think (*without finally deciding on the matter*) that the notice required by s 80(2)(a) *is actual notice and not notice by substituted service,* for such a service by newspaper advertisement would be useless unless the relevant insurance company has been identified by name for the purpose of execution of the judgment obtained against the tortfeasor. (Emphasis added.)

[40] Suriyadi J observed as follows:

> At first blush, my stance could immediately be brushed aside, if not for the fact that a careful study will show that this view was obiter in nature, rather than part of the main decision. In other words, that view was said in passing. *Black's Law Dictionary* (6th Ed) at p 1072 supplies the meaning of 'obiter' and 'obiter dictum' respectively as:
>
> 'obiter': by the way; in passing; incidentally, collaterally;
>
> 'Obiter dictum' reads:
>
> > ... words of an opinion entirely unnecessary for the decision of the case. *Noel v Olds* 78 US App DC 155 at p 586 138 F 2d 581. A remark made, or opinion expressed, by a judge, in his decision upon a cause, 'by the way,' that is, incidentally or collaterally, and not directly upon the question before him, or upon a point not necessarily involved in the determination of the cause, or introduced by way of illustration, or analogy or argument. Such are not binding as precedent. See Dicta; Dictum.
>
> Edgar Joseph Jr FCJ in *Co-operative Central Bank Ltd (In receivership) v Feyen Development Sdn Bhd* [1997] 2 MLJ 829 at p 836A defined it as:

... obiter dictum is a mere chance remark by the court and is used in contradistinction to ratio decidendi — the rule of law for which a case is authority.

[41] In *Talasco*, reference was made to *Datuk Tan Leng Teck v Sarjana Sdn Bhd & Ors* [1997] 4 MLJ 329 where at p 347, Augustine Paul JC (as he then was) said:

It was said as long ago as 1661 that 'precedents sub silentio and without argument are of no moment' (see *R v Warner* (1661) 1 Keb 66). In this regard *Precedents in English Law* by Cross and Harris (4th Ed) states at pp 158–159:

It seems always to have been accepted that if a proposition of law, though implicit in a decision, was never expressly stated either in argument or in the judgment, the decision constitutes no binding authority for it, whether on the ground that there is here an exception to stare decisis, or for the reason that such proposition is not truly part of the ratio. The last 15 years have seen a tendency to regard decisions as not binding at any level of the judicial hierarchy as to propositions expressly affirmed by them if, owing to the absence of any argument on the point, it can be inferred that the deciding court merely assumed their correctness. In this light, decisions without argument must be viewed as a general exception to stare decisis.

[42] Suriyadi J further quoted the case of *Baker v R* [1975] AC 774, where the Privy Council held that although inferior courts were bound by decisions of the Board even if they were per incuriam, they were not bound by propositions of law incorporated into the ratio decidendi which had merely been assumed to be correct without argument.

[43] In *Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee* [2004] 3 MLJ 253; [2004] 2 CLJ 787 the Federal Court having to deal with the second issue that was raised for the first time before the court decided that it should decline to answer the said issue and said as follows:

[8] As the merits of the second issue posed before the court was not considered by the High Court and the Court of Appeal, the court declined to answer the question on the grounds, inter alia: (a) that there were no judgments of the High Court and the Court of Appeal on the issue; (b) it would be unfair to the appellant that a point that was neither raised nor argued in the High Court, and not allowed to be raised by the Court of Appeal and therefore not argued before it, be argued for the first time in this court; (c) it would encourage parties to raise new issues as a case progresses; and (d) the objection was procedural in nature.

[44] In the same case of *Perwira Affin Bank*, the Federal Court formed the view on the first issue as follows:

Learned counsel for the appellant submitted that this court in that case did not consider the question now posed to this court and under present discussion. He submitted:

In the *Ernest Cheong* case, after holding that an action for recovery of arrears of interest after 6 years from the date of judgment is barred by the second limb of s 6(3) of the Limitation Act, the Federal Court did not apply its mind as to whether bankruptcy proceedings are within the ambit of the said provision of the Limitation Act (ie, the Court did not consider whether bankruptcy proceedings is an 'action for recovery of arrears of interest'). The court had applied the said provision as a matter of course to determine the validity of the Bankruptcy Notice under consideration. The authority is therefore of no relevance here.

(It must be pointed out that leave to appeal in the instant appeal was given prior to the decision of this court in *Ernest Cheong*).

Whereas I would not agree that that case (*Ernest Cheong*) is of no relevance to the instant appeal, I agree that the issue now posed to this court was not discussed but rather it was assumed that s 6(3) applies. So, the question is still open for this court to decide.

[45] The authorities above hence suggest that this court is permitted to deal with the issue on para (f) of art 149 posed in *Khairuddin* but was not discussed by the Court of Appeal which may render the Court of Appeal decision as relevant but per incuriam. At least this is the view formed by this court that it was assumed then that para (f) has no application without deliberating on the point in the judgment. As SOSMA is quite a recent law enacted, and issues arising on the application and interpretation of the Act are now reaching the courts' ground, the meticulous determination by the apex courts on the submissions put forward by parties which are, from the parties' perspective seem to support the fact in issue, thus is crucial. This ensures the lower courts are guided in coming to their decision.

[46] Coming back to the applicant's submission urging this court to rely on the decision of the Federal Court in *Koh Chin Wah,* this court agrees with the submission by the DPP, that the exception in *Young v Bristol* applies, relying on the limb below:

(a) That the Court of Appeal is entitled and bound to decide which of the two conflicting decisions of its own it will follow;

(b) ...; and

(c) That the Court of Appeal is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam.

[47] This is also in line with the harmonious construction rule as submitted by the DPP, relying on *Abdullah bin Atan*'s case which states as follows:

[53] Furthermore, the DDA is a specific Act relating to and dealing with trials in respect of dangerous drugs. The CPC, on the other hand, is a law of general application. Where there is a conflict between a specific law and a general law, the

conflict may be resolved in one of two ways. The first is via the maxim generalia specialibus derogant. The second is the doctrine of harmonious construction.

...

[58] Section 180(4) of the CPC and s 37(da) of the DDA must be read harmoniously, applying the doctrine of harmonious construction. In a nutshell, the doctrine requires that the legislation be construed in a way which would achieve a harmonious result and that construction should favour coherence in the law (see *Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v Muzaidi bin Mukhtar* [2020] 1 MLJ 141 at paras 78–79). A harmonious construction would limit 'credible evidence' to the actual finding of possession, as propounded in *Muhammad bin Hassan*, and once 'that is established successfully, it would invoke the presumption of trafficking. Defence will then be called on trafficking where the legal burden would shift to the accused to disprove trafficking'.

[48] Furthermore, in the absence of the grounds of judgment ('GOJ'), the basis for the decision in *Koh Chin Wah* remains open to speculation as follows:

First: whether the apex court decisions in *Chew Siew Luan* (at para 14 above) and *Leong Ying Ming* [1993] 2 CLJ 143 Supreme Court agreed and applied Chiew Siew Luan's decision. have been referred to the Federal Court Judges in *Koh Chin Wah;*

Secondly: if the answer is 'no', whether a different decision would have been arrived at by the Federal Court if these cases were referred to;

Thirdly: if the answer to Q1 is 'yes', have these decisions been over ruled by the Federal Court in *Koh Chin Wah.*

[49] In the absence of the GOJ, it is unsafe to latch on the said case as authority on the issue before this court as the issues are one that needs this court to scrutinise the respective laws and decided cases with written judgments of prior and present cases to enable a full comprehension of the issues and reasons for the said decisions, before a decision is arrived at. Without the GOJ of *Koh Chin Wah,* although the final decision is known, the basis the decision was arrived at cannot be ascertained.

STARE DECISIS AND DEVELOPMENT OF THE LAW

[50] Having perused intensely the authorities, inevitable the decisions show a considerable difference of opinion. The recent decisions of the Federal Court in *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [2021] 1 MLJ 750 dated 12 January 2021 itself reflect this. The facts in *Maria Chin* as extracted from the GOJ of the Federal Court by Abdul Rahman Sebli FCJ are as follows:

(a) the appellant a holder of a valid Malaysian passport on her way abroad was stopped by the immigration authorities and was told that there was a travel ban imposed on her and that she could not leave the country;

(b) the reason for the ban was that pursuant to a circular titled 'Pekeliling Imigresen Malaysia Terhad Bil 3 Tahun 2015', the appellant was blacklisted from leaving the country for a period of up to three years starting from 6 January 2016; and

(c) the ground for the blacklisting (which was lifted two days after she was stopped at KLIA) was that the appellant had disparaged the Government of Malaysia ('Memburukkan Kerajaan Malaysia') at different forums and illegal assemblies.

[51] The critical issues in *Maria Chin* relevant as decided principles towards the determination of the issues in the present case are:

(a) a declaration that the respondents cannot act under s 59 of the Immigration Act 1959/63 to deny the appellant a right to natural justice as this is in violation of the Federal Constitution in particular art 160 read together with art 4 of the Federal Constitution and relevant case law;

(b) a declaration that the following provisions of the Immigration Act 1959/63 are unconstitutional:

(i) s 59 which excludes the right to be heard; and/or

(ii) s 59A which excludes judicial review.

[52] On s 59A, it was argued by the applicant *Maria Chin* that the validity and constitutionality of the said section must be considered in the light of *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561, *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545 and *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1 all are decisions of the Federal Court which reaffirmed the principle that judicial power resides in the Judiciary under the doctrine of separation of powers and which, according to the cases, cannot be abrogated or removed even by constitutional amendment (*Maria Chin* at p 885).

[53] Interestingly, the real issue in all these cases including the present case before this court boils down to one: the doctrine of separation of power. The majority decision in *Marina Chin* distinguished the cases above stating that not only the facts in *Semenyih Jaya* and *Indira Gandhi* are different from the facts in *Sugumar Balakrishnan*, the constitutional and/or legal issues raised were also different.

[54] As to *Alma Nudo Atenza,* it concerns the constitutionality of s 37A of the Dangerous Drugs Act 1952 and not a case on the constitutionality of ouster clauses, although there are passages in the judgment that give the impression

that Parliament has no power to destroy the 'basic structure' of the Federal Constitution and that the courts can prevent that from happening (para 71 p 29).

[55] In the analysis of the majority decision of the Federal Court, it is art 121 that gives s 59A of the Immigration Act its life by virtue of its creation by the federal law. This is what the majority says:

> [87] In *Liyanage v The Queen* [1967] 1 AC 259 the Privy Council observed, inter alia, that powers in countries with written constitutions must be exercised in accordance with the terms of the constitution from which the powers were derived but of course no validity should be given to acts which infringe the constitution. Section 59A of the Immigration Act must be read in that light and in that spirit.
>
> [88] Clearly, it is a term of art 121(1) of the Federal Constitution that the jurisdiction and powers of the courts are 'as may be conferred by or under federal law'. In the context of the present case, that 'federal law' is s 59A of the Immigration Act. Thus, federal law has determined that the jurisdiction and powers of both High Courts in immigration matters are only to adjudicate on procedural non-compliance and not on the substantive decision of the decision maker. Both the High Court of Malaya and the High Court of Sabah and Sarawak have no jurisdiction to travel outside the confines of that power.
>
> [89] For the two High Courts to ignore the limitations imposed by s 59A of the Immigration Act in the name of separation of powers and judicial independence is to defy art 121(1) of the Federal Constitution, which the two High Courts are not at liberty to do. Salleh Abas LP in *Lim Kit Siang v Dato' Seri Dr Mahathir Mohamed* [1987] 1 MLJ 383; [1987] 1 CLJ 40; [1987] CLJ Rep 168 once said:
>
> > The courts have a constitutional function to perform and they are the guardian of the constitution within the terms and structure of the Constitution itself; they not only have the power of construction and interpretation of legislation but also the power of judicial review — a concept that pumps through the arteries of every constitutional adjudication and which does not imply the superiority of judges over legislators but of the Constitution over both. The courts are the final arbiter between the individual and the state and between individuals inter se, and in performing their constitutional role they must of necessity and strictly in accordance with the constitution and the law be the ultimate bulwark against unconstitutional legislation or excesses in administrative action.

[56] It is very important for this court to again repeat what was agreed and accepted by the majority of the Federal Court in *Maria Chin*, having agreed with the decided authority in UK on a similar issue, at pp 900–901 as follows:

> [530] Given the clear language of s 59A of the Immigration Act and on the strength of the supporting authorities cited by the respondents, including *Sugumar Balakrishnan*, I accept the following arguments by the learned senior federal counsel as stating the correct position of the law:

(a) Parliament can depart from the general law or fundamental principles such as natural justice by expressing its intention with irresistible clearness: *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252. Rules of natural justice regulating the exercise of statutory power may be excluded by plain words of necessary intendments: *Annets v McCann* (1990) 170 CLR 596. Courts are generally willing to find evidence of the intended exclusion of natural justice: *Brettingham-Moore v Municipality of St Leonards* (1969) 121 CLR 509; *Pearlberg v Varty (Inspector of Taxes)* [1972] 2 All ER 6; *Furnell v Whangarei High School Board* [1973] AC 660; and

(b) to ascertain whether the plain words of a statute connote the necessary intendment, it is only necessary to pay close attention to the relevant statute: *SZBEL v Minister for Immigration and Multicultural and Indigenuous Affairs* (2006) 228 CLR 152; *Kioa v West* (1989) 159 CLR 550. The conferral of an unconditional discretionary power to a public authority suggests that natural justice is not intended to apply: *Salemi v McKellar [No 2]* (1977) 137 CLR 396.

[531] Section 59A of the Immigration Act has expressed with irresistible clearness the intention of Parliament to exclude judicial review on the decision made by the Minister, the Director General, and, in the case of Sabah and Sarawak, the state authority.

[532] The recent decision of the UK Supreme Court in *R (on the application of Privacy International) v Investigatory Powers Tribunal and others* [2019] UKSC 22 (Privacy International) drives home the point in the clearest of terms. One of the questions posed for the determination of the court in that case was whether Parliament might by statute 'oust' the supervisory jurisdiction of the High Court to quash the decision of an inferior court or statutory tribunal of limited jurisdiction, a question that is similar in pith and substance to the question posed in relation to s 59A of the Immigration Act. It was decided by majority (Lord Carnwath, Lady Hale and Lord Kerr) that:

> ... *Judicial review can only be excluded by 'the most clear and explicit words'* (Cart, para 31). If Parliament has failed to make its intention sufficiently clear, it is not for us to stretch the words used beyond their natural meaning. It may well be that the promoters of the 1985 Act thought that their formula would be enough to provide comprehensive protection from jurisdictional review of any kind. (Emphasis added.)

[57] This stand is not new as a similar stand was taken by the Federal Court in *Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2003] MLJU 841; [2004] 1 CLJ 81 where the judgment by Steve Shim Chief Justice said at p 93 (CLJ) that judicial review which is essentially a creature of common law can be excluded by statutory legislation if the words used are unmistakably explicit.

[58] The Federal Court by majority in *Maria Chin,* upon reverting to the

history commencing from the Reid Commission and the drafting of the Federal Constitution, came to this most important finding as follows:

> [539] The net effect of omitting the entire draft art 2 on enforcement of rights is obvious, that there is no 'guaranteed' 'constitutional right' to a perceived 'unhindered access' to a court of law seeking for 'full remedy'. In other words, the type and extent of remedy available is a matter for the Legislature to decide.
>
> [540] The Reid Commission quite evidently did not consider the issue as having any adverse effect on judicial power. Instead, by deferring their resolution to 'ordinary law', it shows that the real issue is rather the enforcement aspect, ie limitation on available remedy to an aggrieved party. This is the context in which the limitation on the court's power of review under s 59A of the Immigration Act must be understood.
>
> [541] In the result, federal law may prescribe what the legislature considers as 'sufficient remedy' to meet the demand of the circumstances. The very act of prescribing a remedy by federal law, without more, does not amount to an act calculated to jeopardise the due exercise of judicial power'.

[59] As extracted from the judgment in *Maria Chin* quoted above, 'the real issue is rather the enforcement aspect, ie limitation on available remedy to an aggrieved party'. It is this issue that this court now proposed to explore, and to determine if there is any basis for this limitation of remedy.

LIMITATION ON AVAILABLE REMEDY TO AN AGGRIEVED PARTY

[60] SOSMA as enacted under art 149 of the Federal Constitution centred on addressing action or actions by a substantial body of persons with the effect of causing fear or organised violence against persons or property; excite disaffection against the Yang di-Pertuan Agong; or action(s) which is prejudicial to public order or the security of the Federation or any part thereof. From the name of the Act itself 'Security Offences (Special Measures)' and the list of offences identified to be 'security offences' in the First Schedule, (Security Offences: Penal Code (Act 574): (i) offences under Chapter VI; (ii) offences under Chapter VIA; (iii) offences under Chapter VIB; Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (Act 670); Offences under Part IIIA Special Measures Against Terrorism in Foreign Countries Act 2015 (Act 770)) the offences are not the ordinary offence such as theft or murder with one perpetrator and a single victim.

[61] It speaks of 'substantial body of persons'. In *Selva Vinayagam a/l Sures v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2021] 1 MLJ 601, the Federal Court in dealing with the preamble of art 149 in a habeas corpus application, came to the following decision:

> [44] What is meant by the phrase 'a substantial body of persons'? The word 'substantial' has been defined by the *Oxford Advanced Learner's Dictionary* (5th Ed)

as large in amount or value; considerable'; 'considerable' is defined as 'great in number or size'. 'Body' is defined as 'a group of people working or acting as a unit (See *Oxford Advanced Learner's Dictionary* 5th Ed) or as '[a] number of individuals spoken of collectively, usually associated for a common purpose, joined in a certain cause or united by some common tie.' (See *Words, Phrases &Maxims — Legally & Judicially Defined* Vol 2, Anandan Krishnan, LexisNexis 2008). The word 'person' refers to a human being as an individual or a human being, especially not identified (see *Oxford Advanced Learner's Dictionary* 5th Ed).

In the light of the foregoing, we think that the phrase 'a substantial body of persons' refer to a large number of individuals acting in concert or working together for a common purpose. In the context of Act 316 ((DDA) Special Preventive Measures), we think that it refers to action which is prejudicial to public order which has been taken or is being threatened by a large number of individuals acting together in the trafficking in dangerous drugs.

[62] Similarly, the present charges against the applicant who are charged with one Nathan a/l Rajadran are:

(a) sabotage under s 124K of the Penal Code;

(b) ss 34(2) and 34B(1)(a) of the Environmental Quality Act;

(c) ss 18(1) and 19A of the Environmental Quality Act; and

(d) s 61(1)(b) of the Water Services Industry Act 2006,

all charges read with s 34 of the Penal Code.

[63] It is to be noted also that in the course of the proceeding, on another matter before a different High Court where a s 430 charges brought and bail granted by the High Court. This is part of judicial notice that cannot be ignored by this court. Although in this s 430 case, it involves more than two persons and the Federal Court in *Selva Vinayagam* had defined 'substantial body of persons' to mean a large number of individuals acting in concert, based on the dictionary meaning of the word, any number making more than one suspect acting together in the commission of the crime must logically fall within this definition, based on the reason below.

[64] One example would be the number of persons in a gang robbery which initially s 391 of the Penal Code speaks of five or more but was amended in 2007 to be two persons or more (Act A1273 effective 7 September 2007). This would be the least number of persons required by law to form a gang. The definition of the word 'gang' is a group of criminals who work together (https://dictionary.cambridge.org/dictionary/english/gang on 22 January 2021). Thus, this court's view is that the word 'gang' and 'substantial body of persons' would have the same meaning.

[65] This logically would fit into other offences scheduled as 'security offence' such as s 130KA of the Penal Code (s 130KA: Member of a terrorist group 'Whoever is a member of a terrorist group shall be punished with imprisonment which may extend to imprisonment for life and shall also be liable to a fine). If the strict parameter of 'substantial body of persons' to be satisfied, it would only mean it is only a security offence if a big number of persons are charged as being member of a terrorist group, which cannot be the case.

[66] Similarly, 'organized criminal group' under s 130U of the Penal Code (Chapter VIB Organized crime) means 'a group of two or more persons, acting in concert with the aim of committing one or more serious offences, in order to obtain, directly or indirectly, a material benefit, power or influence'.

[67] The constitutionality of SOSMA has been acknowledged by the Court of Appeal in *Khairuddin*. There is a presumption of constitutionality operating in favour of SOSMA. Hence, the Court of Appeal said that 'in the absence of any challenge and ruling on the constitutionality of SOSMA, it must be taken that SOSMA remains a valid piece of legislation' (at p 711 para 23).

[68] On that premise, SOSMA is in compliance with art 149 and this would include the offences in the First Schedule of the SOSMA.

THE INTENTION AND PURPOSE OF THE ACT: WHY BAR THE SUSPECT FROM BAIL

[69] A step back in history, our Lahad Datu intrusion (*Public Prosecutor v Atik Hussin bin Abu Bakar and other cases* [2016] MLJU 968) would be the best example to start with. It is no doubt a case of terrorist attack as charges were brought under s 121 (Chapter VI 'Waging or attempting to wage war or abetting the waging of war against the Yang di-Pertuan Agong, a Ruler or Yang di-Pertua Negeri') and s 130KA (Chapter VIA 'Member of a terrorist group') of the Penal Code. But the concern is, as reflected in the facts carefully laid by the learned trial judge Stephen Chung Hian Guan J as follows:

> [4.2.] On the way back to the river mouth at Kg Tanduo PW2 (an auxiliary policeman stationed at Felda Sahabat, Lahad Datu), saw many foreigners at the surau at the kampung, some of them in camouflaged uniform. During the trial they were referred to as the armed intruders. Although, when some of the family members of the Sultan of the Sultanate of Sulu and North Borneo came to Sabah for visits, they and some of their supporters in Sabah were under police surveillance, the security forces (ie the police and armed forces) were caught unaware of the intrusion by the armed intruders at Kg Tanduo. Either there was an *intelligence failure* or had underestimated the Sulu Sultanate.

[70] Intelligence gathering is a paramount security measure of any nation. More often than not, intelligence gathering provides an avenue to thwart more complex and challenging terror threats (https://www.theborneopost.com/2Q19/02/22/dr-mahathir-calls-for-upgrading-of-military-intelligence-gathering/ on 22 February 2019). This court would believe that all Malaysians no doubt would equally agree with the former Prime Minister who said as follows:

> Our preparations are focused on information, intelligence. We must be able to identify, at an early stage, who a terrorist could be because he (or she) will be undergoing training or has close ties with terrorist groups'. (Note 29.)

[71] Security of a nation and not just Malaysia, all are dependent on this intelligence gathering. That is why certain laws are identified as a preventive law such as the Internal Security Act (now repealed). Otherwise, the absence of such laws, only to enable the availability of admissible evidence to facilitate charging these suspects in court, may only result in more serious injuries or loss of life or damage to property of a significant result, before the presence of such evidence that can be relied upon by the trial courts. Massive damage would have result.

[72] It was said in *Khairuddin* that SOSMA is to address terrorist acts. However, terrorist acts may take many forms. One clear example from abroad would be the attack on the World Trade Centre in US on September 11. In Malaysia, as a hypothetical example, it may be an attack on Putrajaya. However, that would be one direct attack against the state. As a matter of fact, the thought that such attack will not take place here in our homeland has in fact taken place in Perak (*Public Prosecutor v Mohd Amin bin Mohd Razali & Ors* [2002] 5 MLJ 406 (HC) and *Mohd Amin bin Mohd Razali & Ors v Public Prosecutor* [2003] 4 MLJ 129 (FC)) and Lahad Datu, Sabah (*PP v Kadir Bin Uyung & Anor and another appeal* [2017] MLJU 1692, decision upheld by the Federal Court on 15 January 2018). It is not too farfetched to say that terrorism has emerged as one of the means of waging war.

[73] The story in the Lahad Datu intrusion began with the failure to communicate the intelligence pertaining to armed intrusion obtained by one Corporal attached with the Special Branch (*Public Prosecutor v Hassan bin Hj Ali Basri* [2014] 7 MLJ 153). The said intelligence was received from an informer of the Special Branch. The Corporal was subsequently charged under s 130M Part VIA Penal Code and convicted. The lesson learnt is that 'we saw it coming but did not respond' and this led to the intrusion.

[74] The terrorist actions 'taken or threatened by substantial body of persons' which is set as the operative part contained in art 149, may take other forms, and the effect could be immediate or delayed. Disrupting or even

poisoning the water supply would be one example and all these actions are taken or threatened by substantial body of persons. All these may fall as 'terrorist attack' or it would rightly come under the definition 'essential service' of s 130A of the Penal Code offences against the state but both, ultimately causing the effect under para (f) of art 149 or para (3) of the SOSMA.

[75] One other example pertains to para (c) of art 149 'to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence'. Perhaps it helps to look at some examples. In the US, at one point of time the 'Ku-Klax Klan' exist, a secret US organisation of white protestant Americans, especially in the south of the country, who oppose people of other races or religions. Normally, targeting African American. Closer to home, the recent cases of *Saminathan* and *Suresh Kumar* would probably mirror such kind of mass gathering. Why this court says it is 'mass gathering' is because in *Saminathan* and *Suresh*, it concerns not just one person individually charged but more. The Jihad Islamiah is another example (*Murad Halimuddin bin Hassan dan satu lagi lwn Pendakwa Raya dan satu lagi rayuan* [2018] 6 MLJ 435).

[76] All these would be governed by the specific paragraph in art 149 or SOSMA's preamble but yet the impact of all these actions, undeniably are 'prejudicial to public order in, or the security of, the Federation or any part thereof' under limb (f) of art 149, at least that is the conclusion arrived at by this court.

[77] Coming back to the Lahad Datu case which this court sets as an example, the totality of the evidence shows:

(a) the offending act commenced with an intelligence info by an informer;

(b) it concerns involvement of more than one suspect as the terrorist normally moves in big number; and

(c) our domestic law particularly the Police Act 1967 was enacted to cater for this need.

[78] Section 20(3) of the Police Act 1967 (Revised 1988), in part provides as follows:

> (3) Without prejudice to the generality of the force-going provisions or any other law, it shall be the duty of a police officer to carry out the purposes mentioned in section 3(3); and he may take such lawful measures and do such lawful acts as may be necessary in connection therewith, including —
>
> (a) ...
>
> (b) processing security intelligence;
>
> (c)–(m).

[79] With this security intelligence at the forefront in addition to the fact that terrorist group comprises of more than one person, it is only right that SOSMA s 13 prohibits bail to be given to the already charged accused person. This is to prohibit any further communication between the already charged accused and another suspect yet to be identified or recognised with their purpose either to strategise any existing plan or make new plans, including recruiting new members. This fact may only be available in the form of intelligence information, one not admissible in the court of law just yet. For this reason, SOSMA was legislated with the discretion to allow bail by the court subject to the exceptions, but with an enhanced EMD precaution in place.

[80] One other point is this: although Part VI of the Penal Code states 'Offences Against State' and Part VIA on terrorism, looking at both these sections undeniably the end effect would be on the state, it affecting the public order or security more so that terrorism has now emerged as one of the means of waging war.

[81] Thus, what is meant by 'prejudicial to public order'? In *Arumugam a/l Kalimuthu v Menteri Keselamatan Dalam Negeri & Ors* [2013] 5 MLJ 174 at p 181, Apandi Ali JCA said:

> [14] It is our judgment that on the facts of the case the decision by the Deputy Minister to ban the book is neither so outrageous that defies logic nor against any accepted moral standards. The action taken by the Deputy Minister was one that is needed to be taken in the interest of *national security (including public order)* for which the executive bears the responsibility and alone has access to sources of information that quality it to decide what the necessary action is. And whether the decision is irrational or not, is a question of facts, to be decided by the judge. This is the rationale of Lord Diplock in *Council of Civil Service Unions and Others v Minister For The Civil Service* [1985] 1 AC 374, at p 410, which we followed.

[82] The Federal Court was in agreement with the finding by the High Court judge on the aspect of 'prejudicial to public order' as follows:

> This present book is written on the Kampung Medan racial disturbance. *That is a public order and national security issue in itself.* True, major parts of the book are derived from a PhD thesis, but an academic work couched in rather sedentary and dispassionate language, and made accessible only to a select few at the university, cannot be equated with a book meant for general consumption, and targeted for the Indian community who are portrayed in the book as the victims. This court has to be also mindful of the social and cultural sensitivities of the respective communities in Malaysia and balance it against the need to preserve and protect human rights. Both the statutory and constitutional framework has to be objectively balanced against these sensitivities. In the final analysis, it has to asked and answered whether there were materials before the Deputy Minister on which he could decide as he did in exercise of the statutory objectives of the Act. Objectively viewed, I am of the view there were facts available for the deputy Minister upon which he could

conclude that the book would be prejudicial to public order. In exercise of its judicial review jurisdiction, this court should not supplant the Minister's subjective satisfaction with its own, unless the bounds of legality, in the sense explained above, are clearly transgressed.

[83] That is why, this court comes to the finding that the preamble of SOSMA captures the actions in art 149(c) and (e) of the Federal Constitution.

SOSMA DOES NOT PRECLUDE THE COURT OF ITS JUDICIAL POWER

[84] With the purpose of the Act known, s 13 of the SOSMA limits the release of an accused person on bail only to these three exceptions:

(a) a person below the age of eighteen years;

(b) a woman; or

(c) a sick or an infirm person,

charged with a security offence, other than an offence under Chapter VIA of the Penal Code (Act 574) and the Special Measures Against Terrorism in Foreign Countries Act 2015 (Act 770).

[85] The s 13 gives the discretion to the court when the word used is 'may be released on bail' with the condition that it is subject to an application by the public prosecutor that the person be attached with an electronic monitoring device in accordance with the Criminal Procedure Code.

[86] In furtherance of the court exercising its discretion to release the accused person on bail, the public prosecutor in ensuring the accused person is further monitored in term of his or her movement will require an electronic monitoring device (EMD) be attached. At present, no such application has been moved by the public prosecutor possibly due to the fact that the Criminal Procedure Code on the EMD (s 388A) is yet to be enforced, for whatever reason.

[87] However, even prior to the court granting bail, it is important to highlight that SOSMA does not define who a sick person is. Would this then mean a person suffering from flu and cough is a sick person? Perhaps before any court offers an answer, it is paramount to highlight that the Criminal Procedure Code s 388 also provides a similar exception.

[88] The proviso to s 388(1) of the CPC states: 'Provided that the court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail'.

[89] Section 388A(1) of the CPC gives the discretion to the court to decide if EMD is needed to be attached to the released accused given bail. However, sub-s (5) provides the determining decision on the public prosecutor, to decide if the EMD is required even if the court decides otherwise and the court is required to follow the public prosecutor's decision as it is presumed that this decision by the public prosecutor is exercised in light of the nature of the offence and the circumstances of the case (s 388A(6) of the CPC). Section 388A, as mentioned earlier, is yet to be enforced.

[90] Reverting back on the issue of 'sick person', medically a person experiencing flu and cough is a sick person but from the legal aspect, does it satisfy the exception? This court is of the view that the reason why it is not defined is because the Legislature deems it fit and necessary to leave it to the discretion of the courts to determine the degree of sickness of the accused that entitles him or her to be released on bail.

THE APPLICATION IN THE PRESENT CASE: NON-DEPOSITION BY APPLICANT

[91] Paragraphs 4 and 5 of this judgment has mentioned the omission by the applicant to depose in his affidavit his health condition, contrary to the prayers in the notice of motion.

[92] The additional affidavit of the wife states that on 22 December 2020 the applicant complained of chest pain to his lawyer who came to prison to seek his instruction. The lawyer in return had advised the applicant to inform the prison authority. On the 25 December 2020, the applicant was brought to the Shah Alam Hospital.

[93] What can be sieved here is that there is no real urgency as (with due respect) the counsel did not see it an upmost concern to act immediately upon his client's complaint but had left it to his client's discretion to inform the prison authority. The fact that the applicant was only brought to the Shah Alam Hospital on the 25 December 2020 further support this fact that there was no real emergency.

[94] The wife's affidavit further deposed that the medical officer's memo which states that the applicant is currently undergoing treatment for acute coronary syndrome which the wife further deposed known as 'heart attack' and that the applicant needs close medical observation/treatment at a private hospital and UN. The medical officer's memo attached as exh 'LYF1' to the affidavit.

[95] The medical officer's memo dated 26 December 2020 states 'the applicant is currently being treated for acute coronary syndrome'. No further statement that the applicant needs a close medical observation and need to be referred to UN. This therefore suggests that acute coronary syndrome is a general descriptive term, with symptoms possibly detected but yet to reach a chronic level. If it has reached a chronic level, then rightly so the medical officer's memo ought to state so.

[96] Although on one hand, the public prosecutor had not filed any affidavit by the prison to depose the availability of the medical officers on the prison premise, however, as the general rule is that SOSMA's offence is unbailable unless the case falls within the exception, then the burden is on the applicant to satisfy that it is so. The applicant himself had not deposed anything in his affidavit despite the notice of motion stating that this is the case where the exception applies.

[97] It would indeed be important to have sight of the Minister's speech when tabling the Act as unless the purpose and intention why such provisions are enacted is understood, the primary reason easily deduced inevitably would be to rule that Parliament and not the Federal Constitution is supreme. The relevant Minister's speech is as follows:

> DR.17.04.2012 ms6
>
> Dato' Seri Mohamed Nazri Abdul Aziz: ...
>
> Saya telah mendengar hujah-hujah ini yang telah dibangkit khususnya tentang perkara ini dan saya telah berunding dengan Ketua Special Branch ... supaya mendapat keizinan untuk menerangkan di sini peristiwa-peristiwa itu kerana ini merupakan rahsia yang besar. ...
>
> Ms 15
>
> Dato' Seri Mohamed Nazri Abdul Aziz: ... rancangan serangan bom iaitu enam bom jenis paip diletakkan di kawasan Jalan Telawi 3,
>
> Bangsar... Tujuan serangan mendatangkan bencana kepada pengunjung-pengunjung ... di pusat-pusat hiburan ...
>
> Dato' Seri Mohamed Nazri Abdul Aziz : ...
>
> Tahun 2000, rancangan ... untuk menyerang kapal perang ... yang berlabuh di Pelabuhan Klang. Tujuan serangan bagi mengeruhkan hubungan antara Malaysia dan Singapura. Barang rampasan termasuk ammonia nitrat bagi tujuan serangan tersebut. Tahun 2000, cubaan serangan ke atas pusat pemeriksaan kastam dan imigresen di Woodlands ... Tahun 2001, rompakan ke atas Hong Leong Bank dan Southern Bank ... Tahun 2001, pembunuhan ADUN ... Suspek utama, ... *masih bersembunyi di luar negara.*
>
> ... Tahun 2007, cubaan serangan ke atas KLA Bukit Aman, rangkaian Restoran KFC dan McDonalds oleh JI *casing*. Dengan izin, casing bermakna tinjauan telah dibuat namun perancangan dapat dielakkan setelah tangkapan di bawah ISA. 31

> Januari 2008, dua elemen utama Jemaah Islamiah Indonesia berjaya menyusup ke Malaysia menggunakan pasport palsu dan membuat casing ke atas KLCC dengan tujuan melancarkan serangan ke atasnya. Sekali lagi saya hendak sebut, casing ini bermakna tinjauan, dia meninjau. Kedua-dua mereka ditangkap dan diusir ke Indonesia kini menjalani hukuman penjara di Indonesia.
>
> DR.17.04.2012:
>
> Tahun 2008, empat elemen JI yang direkrut di Malaysia telah ditangkap di Thailand setelah terlibat dalam aktiviti keselamatan di Selatan Thailand. Dua daripada mereka yang berusia 28 tahun telah dikenakan hukuman penjara selama 28 tahun.
>
> Manakala *dua lagi dibebaskan dan diusir ke Malaysia.* Seorang dari mereka hanya berusia 17 tahun ketika ditangkap...
>
> Mereka merekrut ahli-ahli baru ... dan merancang melancarkan serangan di lokasi-lokasi ibadat ... Ini bagi menjawab Kuala Selangor iaitu Kuala Selangor bertanya di bawah Artikel 149, sesuatu itu perlu berlaku, baru kita boleh ambil tindakan. Jadi, sepertimana disebut oleh lawyer Pasir Mas tadi... Dia kata akta ini preventive. Preventive dan pre-emptive. Jadi, sebab itulah sebelumnya perkara itu berlaku, kita dapat menangkap mereka membuat casing ini semua, jadi dia berbentuk preventive. *Kita tangkap dia, itulah setakat hari ini, beberapa peristiwa yang telah dapat dihalang daripada berlaku, disabitkan oleh kerana adanya pre-emptive dan preventive element di dalam Akta ISA itu ...*

[98] Having looked at the Penal Code, what is clear is that the aftermath of offences against state in Part VI and offences relating to terrorism in Part VIA would be similar that is prejudicial to public order or security of the Federation, as ventilated above.

[99] For completeness, it would be necessary to also look at the case of *Mohd Faizal bin Musa v Menteri Keselamatan Dalam Negeri* [2018] 3 MLJ 14 on the issue of 'public order' which cited the case of *Arumugam a/l Kalimuthu* but distinguished it on the facts. The unanimous decision in *Mohd Faizal* did not find the publication to be prejudicial to public order when the court says as follows:

> The order, which prohibited the four books, described the books as 'likely to be prejudicial to public order'. The words 'is likely' show it has potential to happen, might happen or probably to happen. What needed to be proven was not the 'actual public disorder' but anything which was the potential to disrupt public order. The High Court judge did not explain what was the 'potential'.

If it was indeed prejudicial to public order, there was no evidence of any chaos or disorder happening in the country at present or even at the time the order was made. The reasoning was complete unsustainable.

[100] In this present case before this court, the individual act or the cumulative acts of discharging pollutants would possibly have caused water disruption. This fact cannot be ignored (https://www.malaymail.com/news/malaysia/2020/10/20/as-klang-valley-hit-by-repeated-water-cuts-observers-questlon-authorities-e/1914406 Tuesday, 20 October 2020 08:08 AM MYT). The extract of it is produced here as follows:

> However, the Alliance for Safe Community chairman Tan Sri Lee Lam Thye said the latest water disruption is unbelievable and unacceptable as it came just after reports that the water supply has been restored to 686 areas due to the previous water disruption.
>
> Yesterday's disruption in water supply was reportedly caused by odour pollution in Sungai Selangor. Incidentally, this was the same river that caused the pollution that disrupted water supply to millions of consumers less than three months ago.
>
> This is unbelievable. This is unacceptable. This is scandalous. It would seem that all the advice, exhortations and appeals made after the earlier disruption was water off a duck's back,' he said in a statement.
>
> Lee said the disruptions could not have come at a worse time when the nation is facing the threats of the fast-spreading Covid-19 infections.
>
> As part of the SOPs during this pandemic, we are exhorted to keep proper hygiene which requires us to wash our hands frequently but how does one do this without running water. And with our movement restricted during conditional movement control order (CMCO), we cannot even go over to our friends' houses for a shower.

[101] The sabotage offence under s 124K and the offences relating to terrorism (relevant on the limb discharging of substance) appears to address the same result or outcome that is prejudicial to public order as below:

> OFFENCES RELATING TO TERRORISM
>
> Interpretation in relation to this Chapter 130B.
>
> (1) In this Chapter —
>
> (2) For the purposes of this Chapter, 'terrorist act' means an act or threat of action within or beyond Malaysia where —
>
> (a) the act or threat falls within subsection (3) and does not fall within subsection (4);
>
> ...
>
> (3) An act or threat of action falls within this subsection if it —
>
> (a) ...
>
> (b) ...
>
> (c) ...
>
> (d) creates a serious risk to the health or the safety of the public or a section of the public;
>
> (e) ...

(f) ...

(g) involves releasing into the environment or any part of the environment or distributing or exposing the public or a section of the public to —

(i) any dangerous, hazardous, radioactive or harmful substance;

(ii) any toxic chemical; or

(iii) any microbial or other biological agent or toxin;

[102] The charges against the applicant are discharging pollutants under the Environmental Quality Act and discharging noxious substance into public sewage treatment works under the Water Services Industry Act. On the face of the charges itself, these are serious offence that may bring about the outcome under the limbs in art 149, preamble of SOSMA and the Penal Code as ventilated above.

PUBLIC OUTRAGE OR PUBLIC ORDER OR SECURITY AGAINST THE FEDERATION: ONE AND THE SAME?

[103] The third limb of the SOSMA preamble states as follows: 'which is *prejudicial* to public order in, or the security of, the Federation or any part thereof'.

[104] Interestingly, art 9 of the Federal Constitution, although addresses a different action, list these items on an equal footing by providing as follows:

9 Prohibition of banishment and freedom of movement

(1) No citizen shall be banished or excluded from the Federation.

(2) Subject to Clause (3) and to any law relating to the *security of the Federation or any part thereof, public order, public health,* or the punishment of offenders, every citizen has the right to move freely throughout the Federation and to reside in any part thereof.

(3) So long as under this Constitution any other State is in a special position as compared with the States of Malaya, Parliament may by law impose restrictions, as between that State and other States, on the rights conferred by Clause (2) in respect of movement and residence.

[105] This would mean they all ought to receive a coordinate treatment and response as they all come in the same order, none is prioritised over the other. The word 'security' has not been defined and would therefore depend on the facts and circumstances of a case. It is not restricted to just a terrorist appearing at your doorstep armed. In our present modern scenario, security of the Federation or any part thereof against health risk such as currently experienced by the whole world, against Covid19 pandemic is real. This is part of the harmonious construction rule.

[106] In the upshot, this court is of the view that the applicant has failed to satisfy this court that:

First: the charges are not one under the security offence under SOSMA;

Second: he comes under the exception of a sick person that entitles him to be released on bail.

Hence, the application is dismissed.

Application dismissed.

Reported by Ahmad Ismail Illman Mohd Razali